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CIMB BANK BHD

v.

ABDUL RAFI ABDUL RAJAK & ORS

B

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG J
[CASE NO: 23NCvC-158-2011]
10 AUGUST 2012

C ***BANKING:*** *Banks and banking business - Loan secured by charge - Vesting order - Whether valid - Whether s. 50(6) Banking and Financial Institutions Act 1989 and s. 420 National Land Code applicable*

D ***CIVIL PROCEDURE:*** *Parties - Locus standi - Vesting order - Legal effect - Whether bank authorised to take over assets and liabilities pursuant to vesting order - Whether plaintiff had locus standi to commence action - Banking and Financial Institutions Act 1989, s. 50(3)*

E ***LAND LAW:*** *Indefeasibly of title and interest - Fraud - Discharge of charge - Insufficient and void instrument - Whether transfer liable to be set aside - Whether subsequent purchaser bona fide purchaser for valuable consideration - National Land Code s. 340(2)(b), (3)(a)*

F Cempaka Finance had granted a loan to Kelimis Jaya ('third defendant') in 1996 and as a security for the loan, a charge was created over a piece of land in favour of Cempaka Finance. The loan was recalled and Cempaka Finance obtained judgment against the third defendant and its guarantor in 1998. A winding up order was also made against the third defendant on 25 February 2000. On 7 September 2006, the banking business, assets and liabilities G of Cempaka Finance were transferred and vested to CIMB Bank ('the plaintiff'). The plaintiff obtained an order for sale ('OFS') of the land from the Land Administrator Kulaijaya ('fourth defendant') on 10 May 2000. Following three unsuccessful auctions, the fourth defendant issued a certificate for reference to H the High Court under s. 265(3)(b) of the National Land Code ('NLC'). On 25 August 2010, the plaintiff filed an application at the Johor Bahru High Court for an OFS of the land. In the meantime, on 21 April 2012, a discharge of charge (Form 16N) dated 26 August 1999 was presented and registered at the I Kulaijaya Land Office. A transfer (Form 14A) dated 21 April 2012

('first MOT') for the transfer of the land from the third defendant to the first defendant was presented and registered at the Kulaijaya Land Office. On 19 August 2012, a second transfer (Form 14A) ('second MOT') for the transfer of the land from the first defendant to the second defendant was presented and registered at the Kulaijaya Land Office. The plaintiff contended that the registration of the discharge of the charge in November and the land transfer to the first defendant was obtained by fraud and claimed (i) for declaratory relief to reinstate the charge created by the third defendant, and (ii) to annul the transfers of the land from the third defendant to the first defendant and from the first defendant to the second defendant. The second defendant counterclaimed on the grounds that (i) the plaintiff did not have *locus standi* to bring this action as the vesting order could only take effect after being registered with the relevant authority; and (ii) that the second defendant was a *bona fide* purchaser for valuable consideration.

Held (allowing plaintiff's claim; dismissing second defendant's counterclaim with costs):

(1) There could not have been a discharge of charge by Cempaka Finance as the plaintiff had, on 6 September 2006, been vested with the rights and interest of Cempaka Finance over the land. As such, Form 16N executed by Cempaka Finance was a void instrument and the discharge of charge effected through a void instrument was void. (para 25)

(2) The transaction was executed without the knowledge of the official receiver (OR) and the plaintiff. There was no record of consent of the state authority being obtained for the transfer of land to the first defendant, a non-resident. The legal firm that presented the transfer documents to the Kulaijaya land office was a fictitious entity. Accordingly, the first defendant's title to the land was liable to be set aside under s. 340(3)(a) of the NLC as the land was procured by fraud and void instrument. (para 35)

(3) The vesting orders took effect automatically and immediately (*PhileoAllied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd*; *EON Bank Bhd v. Gandarama Sdn Bhd*). The failure to have the vesting order registered does not go to the root of the chargee's right to enforce its statutory right to vitiate

A the entire proceeding filed by the plaintiff, who stepped into the shoes of the registered chargee. Thus, the plaintiff had *locus standi* to bring this action. (paras 21 & 22)

(4) The transfer of the land to the first defendant was procured B by fraud and void instrument. The circumstances surrounding the sale and purchase of the land between the first and second defendant were also not entirely straightforward. The second defendant had thus failed to prove that he was a *bona fide* purchaser for valuable consideration. (para 50)

C **Case(s) referred to:**

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Apoo Krishnan v. Ellamah Ramasamy [1974] 1 LNS 8 HC ***(refd)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA D ***(refd)***

Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Chuan Seng & Anor v. Wan Abdul Hamid Wan Jaafar & Ors [2011] 1 CLJ 898 HC ***(refd)***

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***

E *Dan Sin Wah v. Chan Hai Wee [1951] 1 LNS 16 HC* ***(refd)***

Datuk Jagindar Singh v. Tara Rajaratnam [1983] 1 LNS 21 FC ***(refd)***

Eastern Enterprises Ltd v. Ong Choo Kim [1969] 1 LNS 35 HC ***(refd)***

Eon Bank Bhd v. Gandarama Sdn Bhd [2007] 10 CLJ 176 HC ***(refd)***

Goh Hooi Yin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203; [1990] 2 CLJ F *(Rep) 48 HC* ***(refd)***

Jalaludeen Abdul Aziz v. Thrumalingam S Rajadurai & Anor [2001] 7 CLJ 578 HC ***(refd)***

Jasbir Kaur v. Tharumber Singh [1974] 1 LNS 55 FC ***(refd)***

Karam Singh v. PP [1967] 1 LNS 65 FC ***(refd)***

Koperasi Mahadaya Bhd v. Koperasi Polis Diraja Malaysia Bhd & Anor And G *Another Appeal [2012] 1 CLJ 724 CA* ***(refd)***

Lee Cheong Fah v. Soo Man Yoh @ Saw Man Yoke [1996] 2 BLJ 356 HC ***(refd)***

Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 CA ***(refd)***

H *Liew Yok Yin v. AGS Harta Sdn Bhd [2006] 3 CLJ 787 HC* ***(refd)***

Loke Yew v. Port Swettenham Rubber Company Limited [1913] AC 491 ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors [1981] I *1 LNS 114* ***(refd)***

Narayanan Chettyar v. Official Assignee, Rangoon AIR [1941] PC 93 ***(refd)***

Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v. Koh Kim Guan [1959] 1 LNS 63 HC ***(refd)***
Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***
Owe Then Kooi v. Au Thiam Seng & Anor & Another Case [1990] 1 CLJ 311; [1990] 2 CLJ (Rep) 600 HC ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd [1987] 1 LNS 75 HC ***(refd)***
PhileoAllied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd [2001] 4 CLJ 788 HC ***(refd)***
PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***
Public Finance Bhd v. Narayanasamy [1971] 1 LNS 107 FC ***(refd)***
Ratcliffe v. Watters [1969] 2 NSWR 146 ***(refd)***
Robertson v. Keith [1870] 1 VR (E) 11 ***(refd)***
Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***
Schultz v. Corwill Properties Pty Ltd [1969] 2 NSWR 576 ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 HC ***(refd)***
State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA ***(refd)***
Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***
Tan Chye Chew & Anor v. Eastern Mining And Metals Co [1964] 1 LNS 194 FC ***(dist)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 50(1), (3), (6)
Evidence Act 1950, ss. 101(1), 102, 103
National Land Code 1965, ss. 5, 243, 244(1), 265(3)(b), 340(1), (2), (3), 340(2)(1)(a), (b), 340(3)(a), 420, 433B(1)(b)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Tan Gian Chung (Ng Hooi Huang & Phua Zi Jin with him); M/s Shook Lin & Bok
For the 2nd defendant - M Manoharan (R Devi with him); M/s M Manoharan & Co
For the 3rd defendant - Rosli Ahmad (Mohd Josendra & Mohamad Nazrie with him); Official Receiver and Liquidator
For the 4th defendant - Shahrizal Shaari; DPP

Reported by Sandra Malani Gabriel

JUDGMENT

Vernon Ong J:

[1] The plaintiff's claim is for declaratory relief to reinstate a charge created by the 3rd defendant over the land currently registered in the name of the 2nd defendant and to annul the transfers of the land from the 3rd defendant to the 1st defendant and from the 1st defendant to the 2nd defendant.

Brief Account Of The Facts

[2] In 1996, Cempaka Finance Berhad granted credit facilities ('the loan') to the third defendant (Kelimis Jaya). As security for the Loan Kelimis Jaya created a charge ('the charge') over a piece of land held under GM 46, Lot 1107, Mukim Senai-Kulai, Daerah Kulaijaya, Negeri Johor ('the land') in favour of Cempaka Finance Berhad.

[3] In 1998, the loan was recalled and Cempaka Finance Berhad obtained judgment against Kelimis Jaya and its guarantors for monies due and owing under the loan. Subsequently, a winding-up order was made against Kelimis Jaya on 25 February 2000.

[4] Pursuant to various vesting orders the banking business, assets and liabilities of Cempaka Finance Berhad were ultimately transferred and vested in the plaintiff CIMB Bank Berhad on 7 September 2006.

[5] In exercise of its statutory rights under the charge, the plaintiff obtained an order for sale of the land from the fourth defendant (the Land Administrator Kulaijaya) on 10 May 2000. On 28 March 2002, the plaintiff deposited the original issue document of title and duplicate copy of the charge with the Kulaijaya Land Office. Following three unsuccessful auctions, the Land Administrator Kulaijaya issued a certificate for reference to the High Court under s. 265(3)(b) of the National Land Code 1965 ('NLC'). On 25 August 2010, the plaintiff filed an application at the Johor Bahru High Court for an order for sale of the land.

[6] In the meantime, on 21 April 2010 a discharge of the Charge *vide* a Form 16N dated 26 August 1999 ('the discharge of charge') was presented and registered with the Kulaijaya Land Office. At the same time, a transfer form (Form 14A) dated 21 April 2010 ('first MOT') for the transfer of the land from Kelimis Jaya to the first defendant (Abdul Rafi) was also presented and registered at the Kulaijaya Land Office.

[7] Subsequently, on 19 August 2010 a transfer form ('second MOT') for the transfer of the land from Abdul Rafi to the second defendant Mr Kumarappan @ Thannirmal a/l KM Palaniappan ('Kumarappan') was presented and registered at the Kulaijaya Land Office.

[8] On 24 November 2010, the plaintiff lodged a police report alleging fraud in connection with the discharge of the charge, transfers of ownership of the land from Kelimis Jaya to Abdul Rafi and thereafter from Abdul Rafi to Kumarappan.

Plaintiff's Case

[9] In November 2010, the plaintiff discovered that the charge had been discharged and that the land had been transferred to Abdul Rafi. It is contended that the registration of the discharge of charge was obtained by fraud because (i) the discharge of charge was purportedly signed by the signatories of Cempaka Finance on 26 August 1999; (ii) it was effected without the knowledge or authority of the plaintiff even though the plaintiff was at all material times the registered chargee of the land; and (iii) the plaintiff had never received any monies from Kelimis Jaya or Abdul Rafi to redeem the charge.

[10] The registration of the transfer to Abdul Rafi is null and void under s. 340(2)(1)(a) and (b) of the NLC because (i) it was obtained by fraud and an insufficient or void instrument; and (ii) the first MOT was not executed by the liquidator of Kelimis Jaya. Consequently, the subsequent transfer of the land from Abdul Rafi to Kumarappan is defeasible and liable to be set aside under s. 340(3) of the NLC.

[11] By reason of the aforesaid, the plaintiff is claiming the following relief:

(a) A declaration that the transfer of the land registered on 19 August 2010 under Presentation No. 773/2010 from the first defendant to the second defendant is null and void and of no effect whatsoever;

(b) A declaration that the transfer of the land registered on 21 April 2010 under Presentation No. 335/2010 from the third defendant to the first defendant is null and void and of no effect whatsoever;

(c) An order that all references to the second defendant as registered proprietor of the land is null and void and be removed from the Land Registry in relation to the particulars of title of the land;

(d) A declaration that the discharge of the charge under Presentation No. 1498/1996 *vide* discharge of charge Presentation No. 334/2010 over the land is null and void and of no effect whatsoever and all references to such discharge of charge be deleted from the Land Registry in relation to the land; and

(e) Other consequential orders.

Second Defendant's Defence And Counterclaim

[12] The defence as pleaded is mounted on the following planks:

(i) the plaintiff did not have the *locus standi* to bring this action to defeat the title of Kumarappan to the land;

(ii) Kumarappan is a *bona fide* purchaser for valuable consideration;

(iii) the claim is time-barred.

[13] Kumarappan is counterclaiming against the plaintiff, third defendant and fourth defendant for an order that the registrar's caveat be removed. In the event that his title to the land is defeasible, Kumarappan is claiming that the plaintiff and the Land Administrator Kulaijaya compensate him for losses and damages suffered due to the plaintiff's failure or negligence to register the vesting orders and the Land Administrator Kulaijaya's negligence in registering the discharge of charge and the first MOT.

Overview Of The Salient Facts

[14] The following chronology sets out the events from the creation of the charge leading to – (i) the discharge of the charge; (ii) the transfer of the land to Abdul Rafi; and (iii) the transfer of the land from Abdul Rafi to Kumarappan. For convenience, the charge and the impugned transactions are highlighted in bold below.

1 April 1996	Loan Agreement entered between Kelimis Jaya and Cempaka Finance under which Cempaka Finance granted the loan to Kelimis Jaya.

26 June 1996	Charge created by Kelimis Jaya over the land in favour of Cempaka Finance as security for the loan.
28 June 1996	**Charge registered in favour of Cempaka Finance.**
5 February 1998	Cempaka Finance recalls the loan. Obtains judgment against Kelimis Jaya and its guarantors on 14 April 1998.
25 February 2000	Winding-up order made against Kelimis Jaya.
10 May 2000	Cempaka Finance obtains an order for sale of the land from the Land Administrator of Kulaijaya.
22 December 2000	Vesting order transferring and vesting all the banking business, assets and liabilities including all security created and legal proceedings from Cempaka Finance to United Merchant Finance Berhad with effect from 1 January 2001.
25 June 2001	United Merchant Finance Berhad changed its name to Southern Finance Berhad.
28 March 2002	Original title deed to the land and duplicate copy of the charge deposited with the Kulaijaya Land Office.
29 December 2005	Vesting order transferring and vesting all the banking business, assets and liabilities including all security created and legal proceedings from Southern Finance Berhad to Southern Bank Berhad with effect from 1 January 2006.
6 September 2006	Vesting order transferring and vesting all the banking business, assets and liabilities including all security created and legal proceedings from Southern Bank Berhad to Bumiputra Commerce Bank Berhad.
7 September 2006	Bumiputra Commerce Bank Berhad changed its name to CIMB Bank Berhad.

30 March 2007	Certificate issued by Land Administrator Kulaijaya for reference to the Johor Bahru High Court pursuant to s. 265(3)(b) of the National Land Code 1965.
29 May 2008	Plaintiff lodges proof of debt in respect of indebtedness of Kelimis Jaya with Official Receiver of Malaysia.
24 July 2008	Order obtained by plaintiff for leave to continue with foreclosure proceedings against Kelimis Jaya.
21 April 2010	**Discharge of charge presented and registered with Kulaijaya Land Office. Transfer of ownership of the land to the first defendant registered at Kulaijaya Land Office.**
19 August 2010	**Transfer of the land from the first defendant to the second defendant registered at Kulaijaya Land Office.**
25 August 2010	Plaintiff files application for order for sale of the land at Johor Bahru High Court.
24 November 2010	Plaintiff lodges police report.

Issues To Be Tried

[15] According to the pleaded case of the parties, the issues for determination relates to the *locus standi* or capacity of the plaintiff *qua* chargee to bring this action to defeat Kumarappan's title to the land; it will be pertinent to consider the effect, if any, of the non-registration of the various vesting orders with the Kulaijaya Land Office pursuant to s. 420 of the NLC. In this connection, Kumarappan filed an application under O. 18 r. 19 RHC to strike out the plaintiff's action. For the just and expeditious disposal of this action, the court ordered that the application be heard at the trial of this action. It is also pertinent to consider the validity of the discharge of the charge, the validity of the transfer of the land to Abdul Rafi, and the subsequent transfer of the land to Kumarappan. The court will also consider whether Kumarappan is a purchaser of the land in good faith and for valuable consideration.

Findings Of The Court

Whether The Plaintiff Has The Locus Standi To Bring This Action?

[16] Learned counsel for Kumarappan submitted that the plaintiff has no *locus standi* to bring this action on two grounds. Firstly, the plaintiff's action is based on the charge created in favour of Cempaka Finance which the plaintiff claims to have been vested in the plaintiff under the various vesting orders. As a chargee under the charge, the plaintiff was never the registered proprietor of the land (s. 340 of the NLC; *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 CA; *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 FC). Secondly, the vesting orders are ineffective for want of registration. The vesting orders could only take effect after they have been registered with the relevant authority (s. 50(6) Banking and Financial Institutions Act 1989 ('BAFIA'); s. 420 of the NLC).

[17] In reply, learned counsel for the plaintiff submitted that *Au Meng Nam* and *Tan Ying Hong*, *supra* do not support the proposition that a registered chargee does not have any *locus standi* to bring an action to impeach the indefeasibility of title of the registered proprietor of a land under s. 340 of the NLC. As a registered chargee having interest over the land and whose discharge of charge over the land was obtained by fraud/fraudulent means, the plaintiff has *locus standi* to bring this action for, *inter alia* reinstatement of its charge over the land (ss. 243 & 244(1) of the NLC).

[18] In *Au Meng Nam*, *supra* the plaintiffs who were previously the registered proprietors of a piece of land came to know that the land had been transferred to the first defendant. Apparently, two rogues claiming to be the proprietors of the land entered into a sale and purchase agreement of the land with the first defendant. The first defendant contended that he was a *bona fide* purchaser of the land for valuable consideration and thus obtained indefeasible title to the land under s. 340(3) of the NLC. As assurance, the first defendant took out a third party notice against the solicitors for compensation or indemnity for negligence. The solicitors in turn added the Land Office Administrator as the fourth party to that action claiming for contribution or indemnity for negligence. The High Court dismissed the plaintiff's claim, finding as a fact that the instrument of transfer of the land to the first defendant was a forged document. However, applying the

Federal Court case of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 ('*Adorna Properties*') the trial judge held that the first defendant had acquired an indefeasible title to the land as he was a *bona fide* purchaser for value within s. 340(3) of the NLC. Dissatisfied, the plaintiffs appealed to the Court of Appeal. The main issue before the Court of Appeal was whether the Federal Court case of *Adorna Properties* which was followed by the trial judge was applicable in that case. Gopal Sri Ram JCA opined that the decision in *Adorna Properties* was decided *per incuriam* because (i) s. 340(3) of the NLC applies to subsequent acquirers of land taking from registered proprietors whose title are defeasible; (ii) the Federal Court overlooked the two authorities which held that the NLC provided for deferred indefeasibility (*Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1981] 1 LNS 114 and *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14); and (iii) *Adorna Properties* equated purchasers and registered proprietors which departs from their definition under s. 5 of the NLC. Gopal Sri Ram JCA then held that the plaintiffs' case must succeed because the vendors had no title to pass; the only exception was in favour of a *bona fide* purchaser for value and the evidence conclusively pointed against the first defendant on that issue. Raus Sharif JCA (later PCA) allowed the plaintiffs' appeal on the principal ground that the first defendant failed to show that he was a *bona fide* purchaser for value. The first defendant had concluded the sale and purchase agreement of the land hastily without any proper investigation into the title or the persons claiming to be the proprietors. Further, the consideration paid by the first defendant was below the market value. The court agrees with learned counsel for the plaintiff that *Au Meng Nam*, *supra* is no authority for the proposition that a registered chargee does not have the *locus standi* to bring an action to impeach the indefeasibility of title of a registered proprietor of land under s. 340(2) of the NLC. Similarly, the Federal Court's decision in *Tan Ying Hong*, *supra* (discussed below under the heading 'Indefeasibility of title under s. 340 National Land Code') does not support Kumarappan's proposition.

[19] The second issue relates to the argument that the vesting orders are ineffective for being unregistered. In response, the plaintiff submitted that the vesting of interests of one legal entity to another legal entity pursuant to a vesting order takes effect automatically and immediately upon the making of the vesting order, notwithstanding any law or rule of law and shall be binding

on any person thereby affected (s. 50(3) of BAFIA; *Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131; [1996] 2 MLJ 614; *Eon Bank Bhd v. Gandarama Sdn Bhd* [2007] 10 CLJ 176; [2007] 4 MLJ 247). A

[20] In this case the vesting orders were made under s. 50(1) of BAFIA. There was no evidence to show that the vesting orders were registered with the Kulaijaya Land Administrator pursuant to s. 420 of the NLC and s. 50(6) of BAFIA. Did the fact of the non-registration of the vesting orders render them invalid and ineffective so as to preclude the plaintiff from prosecuting their claim herein? B C

[21] In *PhileoAllied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd* [2001] 4 CLJ 788 the defendant raised the preliminary objection at the hearing of foreclosure proceedings brought by the plaintiff bank. The defendant contended that the plaintiff could not proceed unless and until the registered charge had been registered in the name of the Malayan Banking by way of filing the vesting order in the appropriate land registry. Low Hop Bing J (later JCA) opined that in order to determine this issue, it is of crucial importance that s. 50(3) of BAFIA must be read in conjunction with s. 50(1) of BAFIA. Section 50(3) of BAFIA provides categorically and unequivocally that the vesting order "shall have effect according to its terms notwithstanding anything in law or in any rule of law". When the NLC was enacted in 1965, the BAFIA had not yet been brought into being yet. Therefore, Parliament could not have intended s. 420 of the NLC to override the provisions of ss. 50(1) and (3) of BAFIA which was not in existence then. Further, where there is any inconsistency between the provisions of two Acts of Parliament, as in s. 420 of the NLC and ss. 50(1) and (3) of BAFIA, the latter Act which was promulgated about 24 years later must prevail. In *Eon Bank Bhd v. Gandarama Sdn Bhd*, *supra* VT Singham J also referred to *PhileoAllied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd*, *supra*. He held that the failure to have the vesting order registered did not go to the root of the chargee's right to enforce the statutory right to such extent that it vitiated the entire proceedings filed by the plaintiff who stepped into the shoes of the registered chargee. D E F G H

[22] This court agrees with the learned sentiments expressed in *PhileoAllied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd* and *Eon Bank Bhd v. Gandarama Sdn Bhd*, *supra*. I

Notwithstanding the fact that the vesting orders were not registered with the Kulaijaya Land Office, the vesting orders took effect automatically and immediately upon the making of the vesting orders. The question is answered in favour of the plaintiff. Accordingly, the second defendant's application is dismissed with costs.

Whether The Discharge Of The Charge Is Valid? If Not, Whether Abdul Rafi's Title In The Land Is Indefeasible?

[23] According to the evidence, the discharge of charge (Form 16N) was presented and registered with the Kulaijaya Land Office on 21 April 2010. The Form 16N appeared to have been affixed with the common seal of Cempaka Finance and signed by Raja Datuk Karib Shah bin Raja Shahrudin and Hafizah bt Mustapha.

[24] Mr S Murugesu a bank officer (PW2) testified that (i) the discharge of the charge was effected without the knowledge or authority of the plaintiff; (ii) no redemption statement was requested by Kelimis Jaya; and (iii) the plaintiff did not receive any monies from Kelimis Jaya or Abdul Rafi to redeem the land. On 24 November 2010, PW2 lodged a police report on the matter. The investigating officer ASP Lyidia Mastura binti Alias (PW3) recorded statements from the purported signatories of the Form 16N. Both Raja Datuk Karid Shah and Hafizah denied having signed the Form 16N. They also denied that the company seal affixed to the Form 16N was the seal of Cempaka Finance.

[25] Regardless of whether the signatures on the Form 16N were genuine or forged, the fact remains that as at the date of the presentation of the Form 16N on 21 April 2010, the plaintiff had become vested in the charge by virtue of the vesting orders. By then, Cempaka Finance was no longer in the picture. In fact, as at 21 April 2010, there could not have been a discharge of the charge by Cempaka Finance as the plaintiff had by 6 September 2006 been vested with the rights and interest of Cempaka Finance over the land. This finding is fortified by the fact that both the purported signatories have denied signing the Form 16N and the authenticity of the common seal affixed on it. As such the Form 16N purportedly executed by Cempaka Finance is to all intent and purposes a void instrument. Since the discharge of the charge was effected through a void instrument it must follow that the discharge of the charge is null and void

[26] In the light of the above findings, what effect, if any, is there on Abdul Rafi's title in the land? The plaintiff's contention is that (i) Abdul Rafi's title to the land is defeasible under s. 340(2)(a) and (b) of the NLC; (ii) the instrument of transfer (the first MOT) of the land from Kelimis Jaya to Abdul Rafi was obtained by fraud and is an insufficient or void instrument.

(Indefeasibility of title under s. 340 of the National Land Code)

[27] According to s. 340(1) of the NLC, a title which is registered is indefeasible in that it is free of all adverse claims or encumbrances not noted on the register. In other words, the registered title cannot be challenged by anyone. The indefeasibility of title is, however, not absolute. It may be set aside under the following circumstances prescribed under s. 340(2) of the NLC.

(a) in any case of **fraud or misrepresentation** to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an **insufficient or void instrument**; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. (emphasis added)

[28] The concept of indefeasibility has now been restated and enunciated succinctly in the landmark decision of the Federal Court in *Tan Ying Hong*, *supra*. In that case the first defendant purporting to act under a power of attorney executed two charges in favour of a bank as security for a loan made in favour of the second defendant. The plaintiff (the registered owner of the land) claimed that he did not sign the PA and claimed that the PA was forged. He only became aware of the forgery when he received a notice of demand from the bank. He sought to declare the charges null and void but the application was dismissed by the High Court. The plaintiff's appeal was dismissed by the Court of Appeal. At the Federal Court, one of the principal issues for determination was whether the concept of indefeasibility as adverted to in s. 340 of the NLC referred to immediate or deferred indefeasibility. In *Adorna Properties* it was held, *inter alia*, that by virtue of the proviso to sub-s. (3) of s. 340 of the NLC, notwithstanding that the instrument of transfer was forged, any

purchaser in good faith for valuable consideration is excluded from the application of the said provision so as to confer onto that category of proprietors immediate indefeasibility title to the lands. The Federal Court in *Tan Ying Hong*, *supra* overruled the decision in *Adorna Properties*. The Federal Court found that the error in *Adorna Properties* decision was to read the proviso to sub-s. (3) as being a proviso to sub-s. (2) of s. 340 of the NLC as well. In so doing, the Federal Court in *Adorna Properties* had recognised the concept of immediate indefeasibility under the NLC contrary to the provision of s. 340. The basic principles distilled from the Federal Court's decision may be summarised as follows:

(a) Indefeasibility of title or interest in land can be immediate or deferred.

(b) Section 340 of the NLC conferred deferred indefeasibility as opposed to immediate indefeasibility.

(c) The indefeasibility of any immediate transferee whose interest or title whose registration was obtained by fraud, fraudulent misrepresentation and or forgery is deferred.

(d) Sub-section (3) of s. 340 of the NLC did not apply to an immediate transferee of any title or interest in land. It is only applicable to a holder of a subsequent interest or title, ie, a subsequent transferee claiming through or under the immediate transferee whose interest or title is defeasible.

(Fraud)

[29] The plaintiff's contention is that Abdul Rafi obtained the title to the land by way of fraud. For the purposes of vitiating title to land under s. 340 of the NLC the fraud must be actual fraud. What is fraud? It is impossible to lay down a complete and comprehensive definition of fraud as the range of fraud is infinite. The existence of fraud is a question of fact. It is dependent upon the circumstances of each particular case (*PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136 (FC)). Examples of actual fraud may be found in decided cases (see *Loke Yew v. Port Swettenham Rubber Company Limited* [1913] AC 491; *Dan Sin Wah v. Chan Hai Wee* [1951] 1 LNS 16; [1951] MLJ 189; *Public Finance Bhd v. Narayanasamy* [1971] 1 LNS 107; [1971] 2 MLJ 32; *Jasbir Kaur v. Tharumber Singh* [1974] 1 LNS 55; [1974] 1 MLJ 224; *Apoo Krishnan*

v. Ellamah Ramasamy [1974] 1 LNS 8; [1974] 2 MLJ 201; *Owe Then Kooi v. Au Thiam Seng & Anor & Another Case* [1990] 1 CLJ 311; [1990] 2 CLJ (Rep) 600; [1990] 1 MLJ 234). Actual fraud is where one person causes pecuniary injury to another by intentionally misrepresenting or concealing a material fact which from their mutual position he was bound to explain or disclose. If a person by intentional misrepresentation or concealment of a material fact peculiarly within his knowledge induces another person to enter into a contract, conveyance or similar transaction with him, which he would not have entered into had he known the truth, the contract or other transaction is fraudulent (*Jowitt's Dictionary of English Law* 2nd edn). In order to render an indefeasible title defeasible it is necessary to prove actual fraud (see *Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd* [1987] 1 LNS 75; [1988] 3 MLJ 54). In this context actual fraud means dishonesty of some sort where the designed object of a transfer is to cheat a person of an existing right or whether by a deliberate and dishonest act a person is deprived of his existing right (see *Datuk Jagindar Singh v. Tara Rajaratnam* [1983] 1 LNS 21; [1983] 2 MLJ 196; *Loke Yew v. Port Swettenham Rubber Co Ltd* [1913] AC 491 and *Robertson v. Keith* [1870] 1 VR (E) 11). The fraud must be that of the registered proprietor or his privy. The fraud of an agent will affect the principal who is the registered proprietor unless the agent acted outside his authority (*Schultz v. Corwill Properties Pty Ltd* [1969] 2 NSWR 576; *Ratcliffe v. Watters* [1969] 2 NSWR 146).

Fraud - burden and standard of proof in civil proceedings

[30] In this case the onus is upon the plaintiff to establish the alleged fraud. The standard of proof is that of proof beyond reasonable doubt (*Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 (CA); *Narayanan Chettyar v. Official Assignee, Rangoon* AIR [1941] PC 93, 95 applied in the Singapore High Court in *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v. Koh Kim Guan* [1959] 1 LNS 63; [1959] MLJ 173; *Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387; [1983] 1 MLJ 82 (FC); *Saminathan v. Pappa* [1980] 1 LNS 174; [1981] 1 MLJ 121; *Tan Chye Chew & Anor v. Eastern Mining And Metals Co* [1964] 1 LNS 194; [1965] 1 MLJ 201 (FC)).

[31] Proof beyond reasonable doubt does not, however, mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34 at 38, SC; *Lee Cheong Fah v. Soo Man Yoh @ Saw Man Yoke* [1996] 2 BLJ 356; [1996] 2 MLJ 627; *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48; [1990] 3 MLJ 23).

(Legal and evidential burden of proof)

[32] In the light of the above mentioned, the burden of proof to establish fraud rests upon the plaintiff (s. 101(1) Evidence Act 1950). The burden of proof is on the plaintiff is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the plaintiff throughout the trial. The evidential burden of proof is only shifted to the defendant once the plaintiff has discharged his burden of proof. If the plaintiff fails to discharge the original burden of proof, then the defendant need not adduce any evidence. Therefore, it is the plaintiff who must establish his case. If he fails to do so, it will not do for the plaintiff to say that the defendant has not established his defence (*Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 (CA); s. 102 Evidence Act 1950).

[33] It is, however, not enough for the plaintiff to establish a *prima facie* case at the close of his case. The plaintiff must also establish at the conclusion of the trial that his case is stronger than that of the defendant's. If, at the conclusion of the trial the court finds that the position was evenly balanced, then the plaintiff would have failed to discharge the burden of proof required of him.

(Decision)

[34] The salient facts as disclosed in the evidence at the trial are as follows:

(a) The records of the Kulaijaya Land Office pertaining to the transfer of the land to Abdul Rafi are missing. According to En Mohamad Yazid bin Baharudin (DW7) the Assistant Land Administrator (Registration) at the Kulaijaya Land Office, the

land was transferred from Kelimis Jaya to Abdul Rafi after the discharge of the charge on 21 April 2010. DW7 could not produce the first MOT, Kelimis Jaya's board resolution and other related documents as they cannot be located. A police report was lodged over the missing documents.

(b) The Officer Receiver ('OR') was appointed as the liquidator of Kelimis Jaya after a winding-up order was made against Kelimis Jaya on 25 February 2000. According to the Insolvency Officer En Md Subri bin Hashim (DW6) the OR did not have any knowledge of the discharge of the charge and the transfer of the land from Kelimis Jaya to Abdul Rafi on 21 April 2010. DW6 said that the OR has never signed the first MOT or any documents for the transfer of the land from Kelimis Jaya to Abdul Rafi.

(c) According to the statement of presentation and receipt of payment for the registration of the discharge of the charge and the transfer of the land from Kelimis Jaya to Abdul Rafi under the first MOT on 21 April 2010, the documents in question were presented for registration by "Pannir Seeralan & Associates of Suite 3/16, 3rd Floor, Lucky Plaza, Jalan Dato Lee Fong Seremban 70000 Negeri Sembilan". Ms Krishaveni Subramanian an Executive Officer of the Bar Council Secretariat (PW1) confirmed that there is no record of a legal firm by the name "Pannir Seeralan & Associates".

(d) Abdul Rafi is an Indian national. He is also a permanent resident of Malaysia as indicated on his MY card (exh. D94). The NLC restricts the ownership of land by non-citizens; non-citizens and foreign companies may acquire land only with the approval of the State Authority (s. 433B(1)(b) of the NLC; see also *Jalaludeen Abdul Aziz v. Thrumalingam S Rajadurai & Anor* [2001] 7 CLJ 578; [2002] 1 MLJ 237). There was no evidence to show that the approval of the State Authority had been obtained for the acquisition of the land by Abdul Rafi. Abdul Rafi is reported to have returned to India; and according to Kumarappan, Abdul Rafi passed away in India on 17 November 2010.

[35] Upon careful consideration of the abovementioned facts, the court finds the transfer of the land to Abdul Rafi was obtained by fraud. The transaction was executed without the knowledge of the OR and the plaintiff. The plaintiff did not execute the discharge

of the charge; neither did the OR execute the first MOT. There is no record of the consent of the State Authority being obtained for the transfer of the land to Abdul Rafi, a non-citizen. The so-called legal firm which purportedly presented the transfer documents at the Kulaijaya Land Office is a non-existent or fictitious entity. In the circumstances, the court is driven to the conclusion that Abdul Rafi's title to the land is defeasible on the ground that it was procured by fraud and a void instrument. Accordingly, Abdul Rafi's title to the land shall be liable to be set aside under s. 340(3)(a) of the NLC.

If Abdul Rafi's Title To The Land Is Defeasible, Whether Kumarappan's Title To The Land Is Indefeasible?

[36] The principal thrust of Kumarappan's defence is that his title is indefeasible because he acquired the land from Abdul Rafi in good faith and for valuable consideration (s. 340(3) of the NLC). The term '*bona fide* purchaser' means a buyer in good faith. As a general rule, good faith means the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction. At any rate, whether Kumarappan is a *bona fide* purchaser of the land for valuable consideration is a mixed question of fact and law (*Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 FC; *Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637 CA; *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167 CA).

[37] In law the burden of proof as to any particular fact lies on the party who wishes to make the court believe in its existence (s. 103 Evidence Act 1950; *Karam Singh v. PP* [1967] 1 LNS 65; [1967] 2 MLJ 25, 28 FC). As Kumarappan wishes the court to believe that he is a *bona fide* purchaser for valuable consideration it is incumbent upon Kumarappan to produce the necessary evidence in proof of his allegation (*Tan Ying Hong*, *supra*; *Au Meng Nam*, *supra*). The standard of proof is on a balance of probabilities. There is no burden on the plaintiff to disprove Kumarappan's assertion or to prove that Kumarappan was not a *bona fide* purchaser for valuable consideration (*Eastern Enterprises Ltd v. Ong Choo Kim* [1969] 1 LNS 35; [1969] 1 MLJ 236).

[38] Kumarappan testified that he was introduced by Mr Nauchathali bin Muhammad Buket (DW3) to Abdul Rafi in India. Subsequently, he entered into a sale and purchase agreement dated 12 May 2010 ('the SPA') (exh. D39) with Abdul Rafi for the purchase of the land at a purchase price of RM5 million. Before entering into the SPA, Kumarappan went to see the land and also engaged a land valuer to do valuation of the land (exhs. D36, D95 & D98). He also conducted a land search (exh. D38) on the land. Mr William Edwin (DW2) an advocate and solicitor of The Chambers of William Edwin, a legal firm prepared the SPA and attended to the execution of the SPA by Kumarappan and Abdul Rafi.

[39] At the time the SPA was signed Kumarappan paid RM500,000 in cash being the deposit sum to Abdul Rafi in the presence of DW2. According to a schedule of payments (exh. D41) prepared by Kumarappan RM700,000 in cash was also paid to Abdul Rafi on 19 May 2010. The balance of the purchase price amounting to RM3.5 million was paid through Syed Salim bin Mohamed Yoosuf (DW4) between May to August 2010 to be remitted to Abdul Rafi in India. A letter of authorisation dated 19 May 2010 (exh. D40) purportedly issued by Abdul Rafi to Kumarappan authorised payment of the balance purchase price in cash to DW4 was produced. Kumarappan said that Abdul Rafi wanted the purchase price to be paid in cash; and that because Abdul Rafi was in India at that time, the money had to be remitted to him in India. The final balance of the purchase price of RM300,000 was paid to Abdul Rafi on 25 September 2010. Kumarappan explained that he had investors who have given him the money. The money was withdrawn from three accounts of which one is his. Kumarappan produced bank statements of his business partner and investors one Mr Selvarajoo a/l Elangpillai (exhs. D43 & 58) and his own bank statements with various banks in Malaysia and Singapore (exhs. 46 to 57).

[40] DW4 testified that he was an old friend of Abdul Rafi. Abdul Rafi asked DW4 to help send the money to him in India. DW4 said that between May to October 2010 he received various sums of cash from Kumarappan aggregating RM3.5 million in total and that he transmitted the monies to Abdul Rafi in India through the services of a money changer in Masjid India, Kuala Lumpur. According to the payment vouchers (exh. D42) signed by DW4 and Kumarappan, the cash payments were made on the following dates and amounts.

Date	Voucher No.	Amount
26 May 2010	002	RM300,000
3 June 2010	003	RM500,000
18 June 2010	004	RM250,000
24 June 2010	005	RM200,000
30 June 2010	006	RM200,000
7 July 2010	007	RM500,000
15 July 2010	008	RM250,000
20 July 2010	009	RM250,000
22 July 2010	010	RM350,000
2 August 2010	011	RM300,000
17 August 2010	012	RM400,000
TOTAL		RM3,500,000

[41] Kumarappan also produced an acknowledgement of receipt dated 25 September 2010 (exh. D63) purportedly signed by Abdul Rafi in India. A copy of the Notis Taksiran (exh. D65) for RM144,000 on the transfer was also produced; the stamp duty was paid by Kumarappan. The transfer of the land from Abdul Rafi to Kumarappan was registered on 19 August 2010. The presentation receipt (exh. D66) was produced to support the presentation of the second MOT at the Kulaijaya Land Office for registration.

[42] Lastly, Kumarappan, DW3 and DW4 testified that Abdul Rafi passed away in India on 17 November 2010. In support of this assertion, Kumarappan produced a copy of a Government of Tamil Naidu death certificate dated 4 December 2010 (exh. D108), a letter dated 20 April 2012 (exh. D107) from the Consulate General of Malaysia at Chennai India acknowledging receipt of Abdul Rafi's Malaysian Identity card, a letter dated 25 March 2012 (exh. D107) from Jabatan Pendaftaran Negara Malaysia informing that Abdul Rafi's death has been updated in the register of deaths JPN, and a letter dated 22 June 2012 (exh. D109) from the Jabatan Imigresen Malaysia showing that Abdul Rafi left Malaysia on 24 May 2010.

[43] Learned counsel for the plaintiff submitted that Kumarappan is not a *bona fide* purchaser for valuable consideration. Kumarappan's title is defeasible and should be set aside on the following grounds:

(a) Kumarappan's testimony that he was introduced by DW3 to Abdul Rafi about one month before the date of the SPA is contradicted by DW3 who said under cross-examination that he went with Kumarappan to meet with Abdul Rafi at Hotel Savira, India in 2009;

(b) Within one month from Kumarappan's first meeting with Abdul Rafi in mid-April 2010, Kumarappan entered into the SPA without conducting any valuation of the land;

(c) Neither Kumarrapan nor his solicitor DW2 conducted any bankruptcy search on Abdul Rafi prior to the execution of the SPA;

(d) DW2's testimony that he witnessed Abdul Rafi hand over his identity card (exh. D94) to the magistrate for the purposes of attesting to a power of attorney in favour of Kumarappan on 19 May 2010 is contradicted by Abdul Rafi's temporary identity card dated 19 May 2010;

(e) Despite admitting under cross-examination that he noticed that Abdul Rafi was erroneously described as a Malaysian citizen in the land title search dated 10 May 2010, Kumarappan did not check whether Abdul Rafi, being a non-Malaysian citizen, was allowed to purchase the land from Kelimis Jaya;

(f) The second MOT from Abdul Rafi to Kumarappan was signed in escrow by Abdul Rafi;

(g) The second MOT together with the original title deed to the land were handed over to Kumarappan instead of the stakeholder in contravention of cl. 4.4 of the SPA;

(h) The second MOT was presented for registration on 19 August 2010 before the full purchase price was paid by Kumarappan in breach of cls. 4.3 and 4.4 of the SPA (the last payment being made on 25 September 2010) (*Koperasi Mahadaya Bhd v. Koperasi Polis Diraja Malaysia Bhd & Anor And Another Appeal* [2012] 1 CLJ 724; [2012] 2 MLJ 569);

(i) The full purchase price was not paid within the completion date which fell on 12 August 2010 and no penalty interest was paid to Abdul Rafi under cl. 2.2 of the SPA;

(j) Kumarappan's solicitors did not retain 2% of the purchase price for the purposes of real property gains tax as required under cl. 19 of the SPA (*Liew Yok Yin v. AGS Harta Sdn Bhd* [2006] 3 CLJ 787; [2006] 7 MLJ 49 affirmed by CA in [2010] 1 MLJ 309);

(k) The method of payment of the purchase price of RM5 million was entirely in cash, partly to Abdul Rafi and partly to DW4 by way of staggered payments between 12 May 2010 and 22 September 2010 (*Chuan Seng & Anor v. Wan Abdul Hamid Wan Jaafar & Ors* [2011] 1 CLJ 898; [2010] MLJ 802);

(l) Kumarappan did not have the financial means to pay the RM5 million purchase price in cash;

(m) Kumarappan's testimony that Abdul Rafi received the RM5 million is uncorroborated;

(n) The cash receipts totalling RM3.5 million were not issued by DW4;

(o) The fact that Abdul Rafi had given Kumarappan a power of attorney with full powers to deal with the land even though at that time Abdul Rafi had only received 24% of the purchase price from Kumarappan;

(p) The presentation of the second MOT was done by 'M/s James Wong & Co', a fictitious legal firm (exh. P29);

(q) Other land transactions involving the same parties - two other land transactions for sale of lands in Melaka during the same period (exhs. P71 – P77) involving the same fictitious legal firms of 'M/s James Wong & Co' and 'M/s Pannir Seeralan & Assocs' which presented the transfer documents which Kumarappan allegedly bought from Abdul Rafi (exh. P73); and

(r) Alleged death of Abdul Rafi which is unsubstantiated and unproven.

[44] As a starting point, the evidence shows that Kumarappan entered into the SPA subsequent to his meeting with Abdul Rafi in India. The court is prepared to accept the fact that (i) the full purchase price of RM5 million was paid in cash by Kumarappan

to Abdul Rafi in the manner as described above; and (ii) that Kumarappan and his business partner cum investor had the funds to finance the payment of the RM5 million. DW4's evidence that he was merely an intermediary for the payment of the monies to Abdul Rafi in India is plausible. He described how he collected the monies from Kumarappan at various times, and how he transacted the transfer of the monies to Abdul Rafi in India through the services of a particular money changer in Masjid India, Kuala Lumpur. His evidence is supported by the letter of authority, the payment vouchers and the receipt issued by Abdul Rafi for the full purchase price.

[45] Be that as it may, the existence of a sale and purchase agreement and the payment of the full purchase price is not the sole indicator to show that a person is a *bona fide* purchaser or otherwise. It is also necessary to consider other salient features surrounding the SPA. A purchaser in good faith does not include a purchaser who is careless or who had been negligent (*Au Meng Nam*, *supra*).

[46] Kumarappan's evidence that he conducted a land valuation prior to entering into the SPA does not appear to be supported by the documentary evidence. The three valuation reports (exhs. D36, D95 and D98) were conducted on 21 September 2010, 13 July 2010 and 9 September 2010 respectively which were subsequent to the SPA. It is also pertinent to note that no bankruptcy search was conducted on Abdul Rafi by DW2 or by Kumarappan prior to the execution of the SPA. Both Kumarappan and Abdul Rafi disregarded the express provisions of the SPA on a number of occasions - (i) when the second MOT and the original title deed to the land was handed to Kumarappan instead of DW2 in contravention of cl. 4.4; (ii) when the second MOT was presented for registration before the full purchase price was paid in contravention of cls. 4.3 and 4.4; (iii) even though the full purchase price was not paid within the completion date, no late penalty interest was paid to Abdul Rafi under cl. 2.2; and (iv) DW2's legal firm did not retain 2% of the purchase price for RPGT purposes under cl. 19 and as required by law.

[47] Further, it is impossible to ignore the significant fact that the purchase price of RM5 million was paid in cash. RM5 million is a very substantial sum of money. Payment of such sums in cash and in the circumstances as described by Kumarappan and DW4 are not only unusual but also careless and extremely risky in the

circumstances - in relation to the carrying of hundreds of thousands of Ringgit on 11 occasions to the money changer and the unauthorised foreign exchange transactions conducted through the money changer. There is also a material discrepancy in the letter of authorisation (exh. D40). The letter dated 19 May 2010 refers to discussion on 12 August 2010. The fact that this letter refers to an event in the future is a contradiction in terms; it is not plausible. This contradiction renders this letter to be suspect and devoid of any probative value.

[48] It is also pertinent to observe that notwithstanding that Abdul Rafi had not yet received the full purchase price, he was prepared to create an irrevocable power of attorney giving Kumarappan full powers to deal with the land. This is also an unusual feature of this land sale transaction; it defies logic as no reasonable vendor would divest himself of his powers to deal with the land until the full purchase price is paid or unless there is other security for the payment of the purchase price.

[49] It is equally pertinent to observe that according to the presentation statement (exh. P29) the second MOT was purportedly presented for registration made by 'M/s James Wong & Co' at the Kulaijaya Land Office. 'Messrs James Wong & Co' is a non-existent legal firm; PW1 testified that there is no record of such a legal firm registered with the Bar Council. Kumarappan produced another copy of the presentation statement (exh. D66) which shows Kumarappan's name written by hand and the name of 'M/s James Wong & Co' struck through.

[50] The question of whether Abdul Rafi is still alive or dead is of no consequence to the question in hand. It is evident that the discharge of the charge is null and void. It is also evident that Abdul Rafi's title to the land should be set aside on the ground that the transfer was procured by fraud and a void instrument. The circumstances surrounding the sale and purchase of the land between Abdul Rafi and Kumarappan are not entirely straightforward. The court is not satisfied that at all material times Kumarappan was not aware that Abdul Rafi's title to the land was suspect. The manner in which the sale transaction was entered into, the cash payments of the RM5 million purchase price, the transfer of the monies to Abdul Rafi in India through a money changer, the creation of the irrevocable power of attorney in favour of Kumarappan and the fictitious legal firm which

purportedly presented the transfer documents at the Kulaijaya Land Office can only be described as incongruous. On the totality of the evidence and findings aforesaid, the court is driven to the conclusion that Kumarappan has failed to prove that he is a purchaser of the land in good faith for valuable consideration.

(Second defendant's application to expunge ASP Lyidia's testimony)

[51] The court also considered the arguments of learned counsel for the second defendant and the plaintiff. On the basis of the evidence of her superior officer DW6, ASP Lyidia's testimony relating to Abdul Rafi whereabouts and death was premature and ought to be expunged. However, the court admits her evidence relating to the fact that both Raja Datuk Kaarid and Hafizah denied having signed the discharge of the charge Form 16N and the fact that they denied that the company seal affixed on the Form 16N was the seal of Cempaka Finance.

Conclusion

[52] Consequently, the plaintiff's claim against the second defendant is allowed. The plaintiff shall be entitled to the declarations sought in prayers (a), (b), (c), (d), and (e).

[53] In consequence of the above findings, no liability can be attached to the plaintiff, the third defendant and the fourth defendant on the second defendant's counterclaim. The fourth defendant as the land administrator was merely performing his statutory function and duties in the registration of the transfer of the second MOT. Accordingly, the second defendant's counterclaim is dismissed. The second defendant is hereby ordered to pay the following costs:

(a) Costs of RM150,000 to the plaintiff on the claim and second defendant's counterclaim;

(b) Costs of RM10,000 to the third defendant on the second defendant's counterclaim; and

(c) Cost of RM10,000 to the fourth defendant on the second defendant's counterclaim.